1978

Keene Corporation v. R. W. Taylor Steel Company et al : Brief of Appellants in Support of Petition for Rehearing

Utah Supreme Court

R. Brent Stephens; Richard K. Crandall; Attorneys for Defendants and Appellants;
Chris McCarthy; Attorneys for Plaintiff and Respondent;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

- -

KEENE CORPORATION,
a corporation,

Plaintiff and
Respondent,

vs.

Case No. 15787

R. W. TAYLOR STEEL
COMPANY, a corporation,
RALPH W. TAYLOR and
LOU JEAN M. TAYLOR,

Defendants and
Appellants.

- -

APPELLANTS' BRIEF IN SUPPORT OF ITS PETITION FOR REHEARING

Appeal from Judgment of the Second Judicial
District Court, Weber County, State of Utah
The Honorable John H. Wahlquist

R. BRENT STEPHENS
RICHARD K. CRANDALL, of
SNOW, CHRISTENSEN & MARTINEAU
700 Continental Bank Building
Salt Lake City, Utah 84101

Attorneys for Defendants
and Appellants

DAVID A. GREENWOOD of
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
141 East First South
Salt Lake City, Utah 84111

Attorneys for Plaintiff
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PETITION FOR REHEARING

Case No. 15787

- -

Pursuant to Rule 76(e), appellants hereby petition the court for a rehearing in the above-entitled matter.

The ground and reason for this petition is that the court's opinion, dated April 13, 1979, is based upon an interpretation of Federal Antitrust Laws, a duty which is within the exclusive jurisdiction of Federal Courts.

DATED this 18 day of May, 1979.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Richard K. Crandall
Attorneys for Defendants and
Appellants

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APPELLANTS' BRIEF IN SUPPORT OF ITS PETITION FOR REHEARING

This is an action by Keene Corporation (hereinafter "Keene") against R. W. Taylor Steel Company, Ralph W. Taylor and Lou Jean M. Taylor (hereinafter "Taylors") for the purchase price of goods sold on trade account to Grating, Inc. (hereinafter "Grating"). The Taylors' liability hinges on their guaranty of Grating's trade account. The Taylors claim a defense available to Grating which arises from Keene's anti-trust violations.

I

NEITHER THIS COURT NOR THE LOWER COURT HAS THE JURISDICTION TO INTERPRET OR APPLY FEDERAL ANTI-TRUST LAWS AND THIS COURT'S OPINION AFFIRMING THE LOWER COURTS' DECISION NOT TO STAY THIS ACTION UNTIL THE COMPLETION OF THE FEDERAL ANTITRUST ACTION DENIES THE DEFENDANTS THEIR RIGHT TO ASSERT A VALID DEFENSE BASED UPON VIOLATION OF THE FEDERAL ANTI-TRUST LAWS.

The only basis for Keene's recovery against the Taylors is the Taylors' guaranty of Grating's trade account with Keene. It is axiomatic that one who guarantees a debt has all the defenses available to the party who incurs the debt:

> [S]ince the liability of a surety is commensurate with that of the principal, where the principal is not liable on the obligation neither is the guarantor. U.S. Leasing Corporation vs. DuPont, 70 Cal.Rptr. 393, 444 P.2d 65, 75 (Cal. 1968). See also Continental National Bank vs. Dolan, 564 P.2d 995 (Colo. App. 1977).

Without doubt if Grating has a defense to Keene's claim, then the Taylors, having guaranteed Grating's payment, have the same defense.

Putting all other defenses aside, it was argued before this court that Grating does indeed have an anti-trust defense to Keene's claim. The foundation for this assertion is the pending action of Grating, Inc. v. Keene Corporation and Harsco wherein Grating contends that Keene and Harsco engaged in illegal price-fixing and illegal refusals to deal. As noted by the court in its Opinion in this matter,

the United States Supreme Court decided in Continental Wall paper Co. v. Louis Voight and Sons Co., 212 U.S. 277, 29 S.Ct. 280, 53 L.Ed. 416 (1909), that an anti-trust violation can be an affirmative defense to a contract action. (p.2).

Leaving out for the moment any consideration whether Continental Wall Paper is good law today, it must be made clear the consequences of the existence or non-existence of Grating's anti-trust defense to the purchase contracts which the Taylors guaranteed. If Grating's anti-trust defense is valid, the Taylors may well have no obligation to pay the balance of the trade account. In this event, judgment should be reversed and directed in favor of the Taylors. If Grating's anti-trust defense is invalid, the Taylors ought to honor their guaranty. Judgment then belongs to Keene. Thus the crux of the matter is whether an anti-trust defense is available to Grating.

This question whether anti-trust defense exists is presently being litigated in Grating, Inc. v. Keene Corporation and Harsco, Civil No. NC-75-21, now pending in the U.S. District Court of Utah for the Northern Division, and set for trial in September of this year, the defense is before the court by virtue of Keene's counterclaim for the balance of the trade account incurred by Grating. Under Section 15 of the Clayton Anti-Trust Act, 15 U.S.C.A. §15,

which gives exclusive jurisdiction in these matters to the federal courts, the consideration of this matter is only proper in the federal courts.

Whether a defense based upon violations of federal anti-trust laws is valid is not a proper matter of consideration for this court or the trial court. Exclusive jurisdiction concerning federal anti-trust laws has been given to the federal courts under Section 15 of the Clayton Act. This point was adequately made by Keene in its Appellate Brief. Keene there cited, among other cases, General Talking Pictures v. De Marce, 275 N.W. 750 (Minn. 1938), where the court stated:

> Whether by way of attack or defense, once raised, the issue is the same. Its determination in either case would require this court to apply federal law, the construction of which is expressly and exclusively placed with the federal courts. 279 N.W. at 753. (Noted in Respondent's Appellate Brief at 15).

It is beyond question that the existence or non-existence of Grating's anti-trust defense should not be determined by this court or the trial court, but by a federal court.

It is respectfully submitted that this court went beyond its authority in its Opinion affirming the trial court judgment for Keene. Although this court noted that the anti-trust defense was permissible under Continental Wall Paper, this court went on to decided tdhat Continental Wall Paper

had been implicitly overruled. This is nothing more than construing and applying federal anti-trust law and deciding, as a matter of federal law, that Grating does not have an anti-trust defense. Both appellant and respondents agreed that under the law, this court had no authority to make such a decision. It makes no difference that the court's analysis might be correct. What matters is that the anti-defense exclusively belong to a federal court for determination. Therefore, this court erred in construing and applying federal anti-trust law.

In this case, this court is placed in a serious dilemma. On one side it recognizes that if Grating has a valid defense against Keene, then the Taylors as guarantors have the same defense and thus should prevail as a matter of law. On the other side, this court is without authority to determine the validity of the anti-trust defense. To add to this difficulty, the federal court which has power to adjudicate the validity of the anti-trust defense has not yet resolved the issue.

Logically, there are two avenues that may be followed; rationally there is but one. the first would be to affirm the trial court's striking of the anti-trust defense. This should not be done as a matter of federal law for, as discussed earlier, the validity of the anti-trust defense is

reserved exclusively for the federal courts. If the striking of the anti-trust defense is to be affirmed, it must rest on the trial court's incapacity to decide whether there is an anti-trust defense, coupled with the trial court's impatience to wait for the federal court to decide the issue. Such a determination is tantamount to telling a defendant that although he may have a valid defense, the court will not allow it to be presented because the court which should make the decision has not as yet done so.

It is difficult, if not impossible, to see any reason in such a Procrustean approach. Not only is it patently inequitable, but it presents two serious problems. First, it yeilds the same results as if the court decided to construe the anti-trust defense (against the Taylors) which is contrary to the Clayton Act. It hardly seems judicious to say that since the court cannot decide the issue of defense, it will not allow it. The difference between the approaches is wholly a matter of technical subterfuge to avoid a substantive claim. This is made all the more obvious by the second problem that dismissing the anti-trust defense creates.

If the court affirms the striking of the anti-trust defense with the resultant judgment for Keene, it faces the very real potential of creating additional litigation and

inconsistent results. Should the federal district court which has the same question before it allow Grating the antitrust defense against Keene, Grating would then not be obligated to pay the trade account balance to Keene. This result will not really disturb Keene for it will have already recovered the amount from the Taylors. But it will place the Taylors in the position of having paid out a guaranty on a subsequently determined unenforceable contract. The Taylors will then be put in the position of suffering the loss or return to court.

It is altogether possible that the Taylors could be stuck for the loss on an unenforceable contract to which they were not even a party. Certainly adopting such an approach is not in the interest of sound judicial discretion, especially in light of the alternative approach.

The second approach, and altogether the only rational one, is to stay the proceedings until the federal court with the jurisdiction to decide the issue of the anti-trust defense does so. This would avaoid all the problems the first approach presents. This court would not need to strike what may be a valid defense simply because it lacks authority to decide on the defense. Further, it avoids any possibility of inconsistent results. And lastly, the Taylors would not face the position of having been compelled to pay out on an unenforceable contract.

Keene in its appellate brief, makes two arguments against this approach. First, it argues that since Grating received the goods, it ought to pay the price rather than use the proceeds to finance its litigation against Keene. (p. 39). This argument has two flaws. Where Keene acquired the idea that the proceeds were being used to prosecute the case against itself is unclear. Certainly it cannot be found in the record. But more important, the argument begs the question for it assumes that Grating is obliged to pay, the whole question of the anti-trust defense which only a federal court may decide. Certainly, such circuitous reasoning cannot stand.

Keene's second argument against staying the proceedings is equally erroneous. Keene states:

> No stay of this action is necessary because Grating, Inc. and defendants will receive whatever remedy they are entitled to from the anti-trust claims against Keene in the pending federal action. (Emphasis added). Respondent's Appellate Brief at 40.

The fallacy of this argument is obvious when it is noted that R. W. Taylor Steel Company, R. W. Taylor and Lou Jean M. Taylor are not parties to "anti-trust claims against Keene in the pending federal action". For that reason, the Taylors cannot receive any remedy in the federal action as Keene so blatantly asserts. Certainly, Keene could have named the Taylors as counter-defendants there and thus

avoided the present dilemma, but it chose not to do so. Thus, both of Keene's arguments against staying the proceedings are inapplicable.

In summation, the Taylors as guarantors of Grating's trade accounts have any defense Grating may have to the contract. Grating claims, and there is reasonable grounds for the claim, that Keene's anti-trust violations excuse Grating from the contract. If this is so, Keene may have no judgment against the Taylors. But the validity of this defense cannot be determined by this court for the matter belongs exclusively to the federal courts. Thus in affirming the decision of the lower court in this case, refusing to stay the action, this court has denied the Taylors a defense to which the federal court may well determined they are entitled.

DATED this _____ day of May, 1979.

SNOW, CHRISTENSEN & MARTINEAU

By _____
Richard K. Crandall
Attorneys for Defendants-
Appellants

CERTIFICATE OF SERVICE

I hereby certify that I served appellant's Petition for Rehearing and Brief in support thereof, on respondent Keene Corporation, by causing a true and correct copy thereof to be mailed, postage prepaid, to David A. Greenwood, VanCott, Bagley, Cornwall and McCarthy, 141 East 1st South, Salt Lake City, Utah 84111, on the 18th day of May, 1979.

DATED this 18 day of May, 1979.